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No. 83-398

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1983

MITSUI & CO., LTD., AND
MITSUI & CO. (U.S.A.), INC.,

*Petitioners,*

v.

INDUSTRIAL INVESTMENT DEVELOPMENT CORPORATION,
INDONESIA INDUSTRIAL INVESTMENT CORPORATION, LTD.,
AND FOREST PRODUCTS CORPORATION, LTD.,

*Respondents.*

## REPLY MEMORANDUM FOR PETITIONERS

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## REPLY MEMORANDUM FOR PETITIONERS

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The Petition for a Writ of Certiorari requests the Court to settle discrete, unresolved questions of law regarding primarily whether the antitrust statutes are designed to proscribe only *anticompetitive* acts and whether American courts should infringe upon foreign sovereignty by evaluating the acts of foreign government officials. As to each issue, the petition points out direct and irrevocable conflicts between circuits that need to be, and can be, resolved by a decision in this case.

Respondents apparently do not recognize that such is the very purpose of this Court's discretionary power of review by writ of certiorari. Respondents seek to obscure the presentment of these clean and simple but important issues by arguing the merits of their case with 108 mostly factual footnotes and 11 pages of respondents' view of the facts, with references to the appellate record that is not even before this Court. Respondents' argument on the merits should await the issuance of a writ of certiorari.

## REASONS FOR ALLOWING THE WRIT

1. *Standing.*

In attempting to oppose certiorari by arguing the factual merits of their case, respondents have not grappled with the fact that the Fifth Circuit, on remand, failed to follow this Court's mandate that it reconsider the standing issue in light of *Associated General Contractors of California, Inc.* v. *California State Council of Carpenters*, 103 S. Ct. 897 (1983). The court of appeals, for example, still refuses to address or decide the question of whether a competitor, allegedly "injured" because he is substituted for as a purchaser, has suffered "antitrust injury." That is a question of broad applicability that is ripe for decision by this Court and at least justifies a remand with specific instructions that it be addressed. It is a question that needs to be answered, to determine whether the *antitrust* laws should redress every alleged business wrong or only those that are *anticompetitive*. An answer to this question will define the very essence of antitrust standing.

Subsequent to the filing of the petition herein, a court of appeals decision has been rendered that is in conflict with the decision below on another aspect of the standing issue, thus creating further reason for this Court to review the antitrust standing question. In *Meyer Goldberg, Inc.* v. *Fisher Foods, Inc.*, No. 82-3063 (6th Cir. Sept. 14, 1983), the court held that, in light of *Associated General Contractors* and of *Blue Shield of Virginia* v. *McCready*, 457 U.S. 465 (1982), a stockholder has no antitrust standing under section 4 of the Clayton Act to assert antitrust claims on behalf of a corporation.[1]

The court of appeals below held otherwise, rejecting petitioners' assertion that the instant respondents have no standing

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[1] The court stated that contrary language in *Chrysler Corp.* v. *Fedders Corp.*, 643 F.2d 1229, 1235 (6th Cir.), *cert. denied*, 454 U.S. 893 (1981), had been overruled by *Associated General Contractors*.

because they are merely shareholders in the corporation whose business allegedly was injured by petitioners. *See* Petition, App. E, at 43a-47a. On remand, petitioners suggested to the Fifth Circuit panel that under *Associated General Contractors*, 103 S. Ct. at 910 n. 46, respondents have no standing as stockholders. In its cursory, two-page opinion (Petition, App. I), the panel treated this standing issue as it did all the other issues which petitioners asked it to review in light of this Court's instructions: It failed to address them in any respect.

The question of whether stockholders have antitrust standing is ripe for review. In addition to the holding of *Associated General Contractors*, there is now an irreconcilable conflict between circuits. The Court should grant review or, as a less desirable alternative, should remand with instructions that the appeals panel evaluate the stockholder issue in light of the factors enunciated in *Associated General Contractors* and *Blue Shield*.

2. *Extraterritorial Jurisdiction.*

On the extraterritorial jurisdiction issue,[2] respondents again try to argue their factual case before this Court but do not face the stark conflict between at least three courts of appeals[3] on this

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[2] Respondents' suggestion that "certiorari petitions should be limited to the issues addressed by the last opinion of the court below" (Br. in Opposition at 18) is clearly wrong. See *infra* note 4. Moreover, on remand petitioners requested the opportunity to brief the extraterritorial jurisdiction issue and intervening decisions concerning the other issues. That request was denied by the panel.

[3] The opinion in *National Bank of Canada* v. *Interbank Card Association*, 666 F.2d 6 (2d Cir. 1981), openly differs with that of *Timberlane Lumber Co.* v. *Bank of America*, N.T. & S.A., 549 F.2d 597 (9th Cir. 1977), charging that the latter, which does not require an *anticompetitive* effect, "may lead unwarrantedly to an assertion of jurisdiction whenever the challenged conduct is shown to have some effect on American foreign commerce, even though the actionable aspect of the restraint, the anticompetitive effect, is felt only within the foreign market in which the injured plaintiff seeks to

issue. In *National Bank of Canada* v. *Interbank Card Association*, 666 F.2d 6, 8 (2d Cir. 1981), the Second Circuit held that there is no antitrust jurisdiction unless there is an *anticompetitive* effect upon American commerce. The Fifth Circuit, however, held below that antitrust jurisdiction exists if there is a *direct* or *substantial* effect upon American commerce.

The difference between these two decisions is striking. The Fifth Circuit "divorces antitrust recovery from the purposes of the antitrust laws without a clear statutory command to do so," *Brunswick* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 486-87 (1977), by conferring jurisdiction where any party can show a mere effect upon commerce, while the Second Circuit's opinion recognizes "the pro-competition policy of the antitrust laws," *Blue Shield of Virginia* v. *McCready*, 457 U.S. 465 (1982), by requiring an anticompetitive effect.

This issue needs to be resolved. In the instant litigation, it could end the case or give proper guidance to the trial court. More importantly, the issue could arise in virtually every antitrust case involving foreign commerce.

3. *Act of State Doctrine.*

Respondents' suggestion (Br. in Opposition at 21) that the Act of State question should not be reviewed four years later only underscores petitioners' assertion that the need is greater now than ever for the "motivation-validity" issue to be resolved.[4] Respondents do not deny the existence of an irresolvable conflict, nor do they question that the issue continues to be raised again

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compete." 666 F.2d at 8. The court below relied in part upon the analysis in *Timberlane*. *See* Petition, App. E, at 37a.

[4] The jurisdiction of this Court is undeniable. The Court "may consider questions raised on the first appeal, as well as those that were before the court of appeals upon the second appeal." *Mercer* v. *Theriot*, 377 U.S. 152, 153 (1972). The cases cited by respondents (Br. in Opposition at 21) do not apply because they were decided before review by certiorari was first created in 1914.

and again in this Court and in various circuits or that even the Fifth Circuit subsequently has disagreed with the split decision below. *See* Petition at 21. The issue, implicating a critical question of international relations, will not be resolved until this Court decides it.

Respondents' suggestion that the Act of State Doctrine does not apply to this case is lame. State Department documents subpoenaed in this case reveal that after this lawsuit was filed, respondents' counsel, in an attempt to avoid application of the Doctrine, wrote the State Department requesting a "Bernstein letter," or exception, to the Doctrine. *See Bernstein* v. *N.V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij*, 173 F.2d 71 (2d Cir. 1949), *modified*, 210 F.2d 375 (2d Cir. 1954). The fact that the State Department, in the conduct of our foreign relations, refused to issue such a letter is an indication that the inquiry into the motivations of the Indonesian Government would be offensive and would hinder the conduct of American foreign policy. The district court below apparently agreed, as did a dissenting judge on the Fifth Circuit.

If the court of appeals is not reversed, the inquiry into Indonesian governmental motivation *will be made* as a part of petitioners' case. Accordingly, whether that inquiry is proscribed by the Act of State Doctrine is a matter ready for decision by this Court.

4. *Forum Non Conveniens.*

In still another effort to avoid the merits of an issue, respondents argue that petitioners have waived the *forum non conveniens* question. However, the only cited case carefully limits its holding to reviews of *administrative agency* action and does not apply here. *Communist Party of the United States* v. *Subversive Activities Control Board*, 367 U.S. 1, 30-32 & n. 8(1961).

Respondents do not even mention this Court's most recent *forum non conveniens* opinion, *Piper Aircraft Co.* v. *Reyno*, 454 U.S. 235 (1981). At a minimum, this cause should be remanded for further consideration of the *forum non conveniens* issue in light of factors enunciated in *Piper*, decided after oral argument herein.

The *forum non conveniens* issue bears upon respondents' non-federal claims, as well. In the exercise of discretion, the district court declined pendent jurisdiction over those claims. In light of *Duncan* v. *Cessna Aircraft Co.*, 26 Tex. Sup. Ct. J. 507, 510 (July 13, 1983), *see* Petition at 23 n. 24 (which case respondents completely ignore), at least a remand appears appropriate to re-evaluate the panel's views concerning the pendent claims. *See* Petition, App. E, at 32a n. 2.

For the reasons stated herein and in the petition, a writ of certiorari should issue, and all proceedings in the district court should be stayed.

Respectfully submitted,

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